

No. 13-20-00355-CV

**In the Court of Appeals for the
Thirteenth Judicial District of Texas
Edinburg Division**

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HIDALGO COUNTY WATER IMPROVEMENT DIST. NO. 3,
Appellant/Condemnor,

v.

HIDALGO COUNTY WATER IRRIGATION DIST. NO. 1,
Appellee/Condemnee.

ON APPEAL FROM THE COUNTY COURT-AT-LAW NO. 4,
HIDALGO COUNTY, TEXAS, THE HONORABLE FRED GARZA, JR., PRESIDING

APPELLANT'S REPLY BRIEF

Frank Weathered
State Bar No. 20998600
Frank Weathered P.C.
P.O. Box 6935
Corpus Christi, TX 78466
Phone: (361) 904-3157
Email: frank@weatheredlaw.com

Randolph K. Whittington
State Bar No. 21404500
**Law Office of Randolph Kimble
Whittington**
2014 East Harrison Avenue
Harlingen, TX 78550
Phone: (956) 423-7200
Fax: (956) 423-7999
Email: chagofuentes@rkwlaw.com

W. Brad Anderson
State Bar No. 24055106
Jackson Walker, L.L.P.
100 Congress Avenue, Suite 1100
Austin, TX 78701
Phone: (512) 236-2000
Fax: (512) 236-2002
Email: banderson@jw.com

**Counsel for Appellant
Hidalgo County Water
Improvement District
No. 3**

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Appellant/Condemnor Hidalgo County Water Improvement District No. 3 is referred to herein as “District 3,” while Appellee/Condemnee Hidalgo County Irrigation District No. 1 is referred to as “District 1.” Governmental immunity from suit is referred to simply as “immunity,” while the State and all its political subdivisions are collectively “the State,” unless a distinction needs to be drawn.

SUMMARY OF THE REPLY

The judiciary determines the applicability of immunity in the first instance and delineates its boundaries. If immunity is applicable, then the judiciary defers to the legislature to waive immunity. In the first instance, immunity does not apply to condemnation of public land. In the alternative, the Water Code clearly and unambiguously waives that immunity.

District 1 has conceded that “the Texas Supreme Court has [never] specifically recognized immunity’s application in the eminent domain context” Appellee’s Brief at 29. Nor is there any authoritative holding from a court of appeals recognizing such immunity. On the other hand, the supreme court’s recent decision in *City of Conroe* squarely holds that immunity does not apply to *in rem* proceedings that do not threaten the nature and purpose of the State’s immunity. While *City of Conroe* was not a condemnation case, condemnation is an *in rem* proceeding, which District 1 has never disputed. In turn, condemnation of public land does not threaten the nature and purpose

of immunity, which is to protect the State from raids on the treasury, primarily the cost of the consequences of improvident government actions, thus hampering the wheels of government. Condemnation results in an *in rem* judgment against the land, not a personal judgment against the State. Moreover, the State's interests are fully protected by the constitutional right to just compensation, the constitutional stricture against condemnation for private purposes, and the common law "paramount purpose" doctrine.

Exempting condemnation from the immunity defense not only reflects the legal differences between *in rem* and *in personam* proceedings, it is also good public policy. Granting immunity to the State would have the practical effect of giving preferential treatment to the status quo, meanwhile creating an unworkable framework in populated areas inhabited by multiple property-owning governmental units. Government owners of public land would have no reason to negotiate in good faith with prospective condemnors if the owners knew in advance that their property could not be condemned. A proposed public use would either be forced elsewhere or simply not happen at all. In many instances, like the case at bar, it would foreclose public projects altogether. Just compensation and the paramount purpose test, on the other hand, encourage new or improved public uses while at the same time protecting the valid interests of the State. Indirectly, they also protect the interests of neighboring private landowners who might

otherwise find their own property being condemned because immunity prevented using a more desirable public property next door.

The public land cases upon which District 1 relies, which District 1 refers to as “suits for land,” are not even persuasive, much less controlling. None of them were condemnation cases. Condemnation is a unique proceeding that is actually the opposite of the cases cited by District 1. The constitutional requirement of just compensation, for instance, makes condemnation of public land precisely the opposite of trespass to try title or tax foreclosure suits, both of which would impose liability on the State, either through a money judgment or uncompensated loss of land. Given the right of just compensation, on the other hand, land lost through condemnation never goes uncompensated. The only money judgment in condemnation is the award of compensation to the condemnee.

Finally, even if immunity otherwise applied, the Water Code clearly and unambiguously waives that immunity. District 1’s narrow reading of the Water Code is unreasonable and not supported by either plain, ordinary grammar, the so-called “may plead or be impleaded” stricture, or the absence from the statute of the word “public.” The Water Code’s waiver provisions contain significantly more than mere “plead or implead” type language, and the absence of the word “public” is no more dispositive than the absence of the word “private.”

ARGUMENT

It is the judiciary's responsibility to determine the applicability of immunity in the first instance and delineate its boundaries. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 435 (Tex. 2016); *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006) (observing that immunity is a common-law doctrine). If immunity is applicable, then the judiciary defers to the legislature to waive such immunity. *Wasson*, 489 S.W.3d at 435; *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

I. Immunity does not Apply to Condemnation of Public Land

Aside from one vacated court of appeals opinion, District 1's brief is premised on convincing this Court that *City of Conroe* was a narrow holding and extending it to condemnation of public land would threaten the wheels of government and upset 60 years of case law involving trespass to try title and the like. District 1 has it all wrong. Here's why.

A. *City of Conroe* is not the narrow holding District 1 wants it to be

Immunity does not presumptively apply in every type of legal proceeding brought against the State. Immunity is meant to protect the public treasury and wheels of government by shielding the public from the "costs and consequences of improvident actions of their governments" and "hamper[ing] governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments

rather than using those resources for their intended purposes.” *City of Conroe v. San Jacinto Water Auth*, 602 S.W.3d 444, 458 (Tex. 2020). In suits that do not implicate those concerns, immunity does not apply. *Id.* (holding that *in rem suit* did not implicate immunity’s concerns, therefore immunity did not apply).

An *in rem* lawsuit seeks neither money damages nor any other form of relief that would invade the public treasury or interfere with the wheels of government. As *City of Conroe* notes, an *in rem* proceeding only requires jurisdiction of the *res* because *in rem* judgments “impose no personal liability.” 602 S.W.3d at 458. While *City of Conroe* was naturally focused on the specific type of *in rem* claims before it – expedited declaratory judgment claims – the principle that *in rem* judgments impose no personal liability is inherent in any *in rem* claim because *in rem* jurisdiction is over the *res*, not the person. *Id.* (citing *Bodine v. Webb*, 992 S.W.2d 672, 676 (Tex. App.—Austin 1999, pet. denied)). As such, the *in rem* proceeding in *City of Conroe* was not seeking to impose personal liability and therefore did not implicate the nature and purpose of immunity. *Id.*

While not a condemnation case, the proceeding in *City of Conroe* was nonetheless *in rem*, placing it in the same category as condemnation. *City of Conroe* adopted a practical test to determine whether *in rem* proceedings are subject to immunity: does the *in rem* relief sought threaten the nature and purpose of immunity? If not, immunity does not apply.

City of Conroe involved a suit by the San Jacinto Water Authority (San Jacinto) under the Expedited Declaratory Judgment Act (EDJA), which permits issuers of bonds and other public securities to resolve certain disputes regarding their securities as to all interested parties on an expedited basis. *See* TEX. GOV'T CODE ch. 1205. San Jacinto had contracts to sell water to several cities, using the revenue to pay off its bonds. San Jacinto sought expedited declarations regarding the contracts and specific water rates set under them. Several of the interested parties appearing in the suit were cities that were customers of San Jacinto, including the City of Conroe. The cities sought dismissal based on immunity. While the court of appeals held that immunity was not implicated because the claims only sought enforcement of non-discretionary performance, the supreme court held that immunity did not apply because the declaratory claims were *in rem*.

The supreme court began its analysis by observing that San Jacinto's EDJA claims were strictly *in rem* because they were "instituted directly against a thing, ... taken directly against property, or ... brought to enforce a right in the thing itself." *City of Conroe*, 602 S.W.3d at 457-58. Noting that an *in rem* judgment's effect is limited only "to the property that supports jurisdiction," the supreme court observed that trial courts sitting *in rem* "need not acquire jurisdiction over the person." *Id.* at 458.

To determine whether immunity applied to San Jacinto's *in rem* claims, the court turned for guidance to "the nature and purposes of immunity," which the court

identified as shielding the State “from the costs and consequences of improvident government actions of their governments.” *Id.* In the court’s words, “[a] lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purposes.” *Id.* (citations omitted).

The court then reasoned that (1) San Jacinto’s *in rem* claims “d[id] not subject governments to the ‘costs and consequences’ of improvident government actions because [bond] issuers - government entities themselves - are the very entities the EDJA protects,” and (2) EDJA suits “pose little risk to the public treasury. The Cities - though among the ‘interested parties’ under the statute - are not required to expend financial resources to defend EDJA litigation. Rather, they may choose to do so.” *Id.* (citations omitted). The court concluded that

protection against this sort of judgment is not the purpose of immunity. We have explained that governmental immunity protects against “hamper[ing] government functions by requiring tax resources to be used for ... paying judgments.” EDJA judgments impose no personal liability and thus require no payment. They affect only the *res* at the heart of the suit: public securities, the issuer's authority to issue them, public security authorizations, or expenditures of money relating to the public securities.

Id. (citations omitted).

Although San Jacinto had argued in the court of appeals that the *in rem* nature of the claims was the primary reason immunity did not apply, that court bypassed the *in rem* analysis, opting to hold instead that “immunity is not implicated by claims that

would enforce an underlying statutory or constitutional requirement “that government contracts be made or performed in a certain way, leaving no room for discretion.” 359 S.W.3d 656, 680-81. In affirming the court of appeals, however, the supreme court embraced San Jacinto’s distinct and more fundamental *in rem* analysis, comparing *in rem* jurisdiction with the nature and purpose of immunity, and holding that San Jacinto’s *in rem* claims did not implicate immunity. Fairly read, therefore, *City of Conroe* is not a narrow holding limited to suits under the EDJA. Rather, it touches more broadly on the intersection of immunity and *in rem* proceedings in general.

B. Under *City of Conroe*’s “nature and purpose” test, immunity does not apply to condemnation of public land

1. Immunity is not implicated because condemnation is an *in rem* proceeding

Condemnation is universally acknowledged to be an *in rem* proceeding. District 1 does not dispute this. Therefore, whether immunity applies to condemnation of public land requires application of the “nature and purpose” test adopted in *City of Conroe*. Under that test, immunity’s guiding purpose of protecting the State from raids on the treasury, resulting in interference with the wheels of government, is not implicated.

Not surprisingly, therefore, the supreme court has never held that immunity applies to condemnation of public land. Nor has any court of appeals.¹

For immunity purposes, an *in rem* proceeding such as condemnation is no different than an *in rem* proceeding under the EDJA. Neither seeks to impose any personal liability on the government.² Condemnation, therefore, is not an “impermissible action [for immunity purposes] seeking to establish a contract's validity, to enforce performance under a contract, to impose contractual liabilities, or otherwise ‘attempt to control state action by imposing liability on the State.’” *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex.2009) (quoting *Tex. Nat. Res. Conservation Com’n v. IT–Davy*, 74 S.W.3d 849, 855–56 (Tex. 2002)); *City of Conroe*, 602 S.W.3d at 458 (“our construction of the EDJA's permissible scope limits any concern that *in rem* declarations will be used to circumvent immunity. Issuers cannot seek declarations under the EDJA to adjudicate a claim for breach of contract or to declare their own compliance with a contract.”).

¹ District 1’s reliance on the Dallas Court’s vacated opinion in *Dallas Area Rapid Transit v. Oncor Elec. Delivery Co.*, 331 S.W.3d 91, 99 (Tex. App.—Dallas 2010), *rev’d on other grounds*, 369 S.W.3d 845, 849 (Tex. 2012) is addressed in Section I. E. *infra*.

² 27 AM. JUR. 2d, Eminent Domain § 410 (2018) (noting that while property owners are named in a condemnation complaint as defendants, the effect of a judgment is limited to the property, and the judgment does not impose personal liability on the owner, because the proceeding is *in rem*, the purpose of naming property owners as defendants being solely to provide notice and an opportunity to be heard, and to enable the condemnor to acquire the property free from all claims.). Also, recovery of court costs, should the court award them to the condemnor, does not convert the proceeding into one for personal liability for purposes of immunity. *See City of Dallas v. Jones*, 331 S.W.3d 781, 785 (Tex. App.—Dallas 2010, no pet.) (holding that request for costs in a declaratory judgment action does not implicate immunity to the extent the claim for declaratory relief is not subject to immunity itself).

District 1 argues, however, that without immunity, it will be required, unlike the cities in *City of Conroe*, to use tax resources to defend the lawsuit, thereby hampering governmental functions. Any condemnee may of course incur uncompensated attorney’s fees.³ However, immunity is only intended to guard against “unforeseen expenditures” associated with defending lawsuits. *See Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117, 123 (Tex. 2015). There is nothing unforeseen about condemnation of public land, particularly in populated areas where condemning authorities undoubtedly encounter situations requiring them to cross public land owned by another governmental entity. *See* 1A NICHOLS ON EMINENT DOMAIN § 2.17[1], at 2-72 (“A public way, whether it be a highway, a railroad, or a canal, cannot in the nature of things be constructed for any considerable distance through an inhabited country without crossing other public ways.”). In addition, the “cost of defense” concern refers more to the cost of defending against “attempt[s] to control state action *by imposing liability on the State.*” *See Heinrich*, 284 S.W.3d at 372 (emphasis added) (quoting *IT–Davy*, 74 S.W.3d at 855–56); *City of Conroe*, 602 S.W.3d at 458. Condemnation does

³ Given the statutory two-phase nature of a condemnation proceeding, however, it is equally possible that the condemnee will not incur attorney’s fees at all, depending on the outcome of the first phase. *See generally Seals v. Upper Trinity Reg. Water Dist.*, 145 S.W.3d 291, 295 (Tex. App.—Fort Worth 2004, pet. dismissed) (describing the administrative phase of condemnation, which precedes the judicial phase and does not include service of process or any requirement that the condemnee make a court appearance). If the parties end up satisfied with the award of the special commissioners in the administrative phase, and there are no other contested issues, there is no need for the judicial phase except to facilitate the entry of judgment.

not impose any liability on the State. *See generally* 27 AM. JUR. 2d, Eminent Domain § 410 (2018).

2. Immunity is not required because the interests of the State are fully protected

Separate and apart from its *in rem* nature, condemnation has other unique attributes obviating immunity, particularly the constitutional right to just compensation, the common law paramount purpose doctrine, and the constitutional stricture against condemnation for private purposes.

Just compensation and paramount purpose, for instance, allay District 1's concern that it stands to lose "property or funds" in the event the contested easement is condemned. Appellee's Brief at 30. The "property or funds" argument ignores the constitutional protection granted every landowner, including the government: property is not subject to condemnation in the absence of just compensation.

In turn, the well settled "paramount purpose" doctrine lends the State even greater protection. Whenever a proposed use will substantially destroy the existing use, the condemnation can proceed only if the proposed use is of paramount importance to the public, and there is no other practical location for the proposed use. *Sabine & E. Tex. Ry. Co. v. Gulf & Interstate Ry. Co.*, 46 S.W. 784, 786 (Tex. 1898); *Fort Worth & Denver Ry. Co. v. City of Houston*, 672 S.W.2d 299, 300 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). The courts have routinely applied the paramount purpose test to balance competing public uses to determine whether land may be condemned.

Paramount purpose is based on the common-sense principle that if a proposed use would not “practically destroy” the existing use, then there is no legal, factual, or policy basis for prohibiting condemnation. *See, e.g., Canyon Reg’l Water Auth. v. Guadalupe-Blanco River Auth.*, 258 S.W.3d 613, 616-19 (Tex. 2008). Condemnation is then permitted because it allows for the best use of the property, does not materially compromise the existing use, and avoids the additional costs and incursions on private property that might result from routing around the public property. If the proposed public use will substantially destroy the existing use, on the other hand, condemnation can proceed only if the proposed use is of paramount importance to the public, and there is no other practical location for the proposed use. *Sabine & E. Tex. Ry. Co.*, 46 S.W. at 786; *City of Houston*, 672 S.W.2d at 300.

Government owners of public land are therefore some of the “very entities [condemnation] protects,” through just compensation and the paramount purpose rule. *See City of Conroe*, 602 S.W.3d at 458 (noting that the cities were the “very entities the EDJA protects”).

And finally, the Texas Constitution “prohibits the taking of property for private use.” *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 197 (Tex. 2012) (citing TEX. CONST. Art. 1, § 17). Thus, the State has no concern of losing public land to a private purpose.

3. Conclusion

Condemnation is an *in rem* proceeding. Accordingly, immunity is not implicated. Furthermore, given the constitutional right to just compensation and the judicious balancing of competing public uses under the paramount purpose doctrine, the interests of the State are fully protected. Therefore, immunity is not required.

C. Exempting condemnation of public land from immunity is also good public policy

Applying the paramount purpose balancing test on a case-by-case basis instead of cloaking condemnation with blanket immunity is also good public policy. Granting immunity to the State would have the practical effect of giving preferential treatment across the board to *present* public uses. In the absence of consent, a *proposed* use would either be forced elsewhere or simply not happen at all if there was no practical alternative. In many instances, like the case at bar, immunity would foreclose public projects altogether. This cannot be, and is not, the law.

Here's the problem. Authorities constructing public utility projects in populated areas, like District 3's pipeline, undoubtedly encounter areas where they must cross public land owned by other governmental entities, like District 1. *See* 1A NICHOLS ON EMINENT DOMAIN § 2.17[1], at 2-72 ("A public way, whether it be a highway, a railroad, or a canal, cannot in the nature of things be constructed for any considerable distance through an inhabited country without crossing other public ways."). Immunizing other governmental entities along the route would enable those entities to

effectively bar construction of the project, rendering completion either impossible or entirely dependent on the will of others. In the best-case scenario, it would require unnecessary detours and the acquisition of *private* property - all at an increased cost to the public at large, not to mention interfering with the rights of any private property owners whose land must then be condemned. In addition, imposing a less satisfactory reroute would contravene long-standing Texas law providing that public utilities have discretion to determine a project's route. *See e.g. Morello v. Seaway Crude Pipeline Co., LLC*, 585 S.W.3d 1, 13 (Tex. App.—Houston [1st Dist.] 2018, pet. denied.).

These problems go away if condemnation is exempted from the defense of immunity, leaving just compensation and the paramount purpose doctrine to protect the interests of the State, while at the same time encouraging new or improved public uses.

D. The so-called “suit for land” cases do not apply

District 1 is chiefly relying on a string of cases involving public land, such as trespass to try title and tax foreclosure, that have cloaked the State with blanket immunity. None of these cases involved condemnation. Simplistically, District 1 calls these cases “suits for land,” probably because “land” is the *only* thing they have in common with condemnation. They are not even persuasive, much less controlling.⁴

⁴ Tellingly, the cases were all decided before *City of Conroe*, many of them long before. *E.g. State v. Lain*, 349 S.W.2d 579 (Tex. 1961) (seminal case acknowledging that while the State enjoys immunity in a trespass to try title to public land, individual officials may still be sued for their *ultra vires* acts,

Immunity in trespass to try title or tax foreclosure cases is irrelevant to condemnation of public land, which has attributes mandating different treatment. The constitutional requirement of just compensation, for instance, makes condemnation of public land precisely the opposite of trespass to try title or tax foreclosure, both of which are clearly intended to impose liability on the State, either through a money judgment or uncompensated loss of title to the land. In condemnation of public land, the State never suffers a money judgment, nor any loss of land that goes uncompensated.

Just compensation is not the only attribute making condemnation of public land unique. *See Oncor Elec. Delivery Co. v. Dallas Area Rapid Transit*, 369 S.W.3d 845, 850 (Tex. 2012) (observing that “condemnation of public property generally involves a number of other considerations, such as the nature of the condemnor, the scope of its authority, and an assessment of competing public uses.”) (citing 1 A Julius L. Sackman, *Nichols on Eminent Domain* § 2.17 (3d ed. 2011)). The need to assess competing public uses, for instance, is the purpose of the paramount purpose doctrine. *See, e.g., Canyon Reg’l Water Auth.*, 258 S.W.3d at 616-19.

thereby giving the plaintiff a basis for relief). *Lain* is 60 years old. Despite that, the supreme court has never applied *Lain* to public condemnation cases. The court has even expressly declined the opportunity, first in *Oncor*, 369 S.W.3d at 849, and then in *In re Lazy W District No. 1*, 493 S.W.3d 538 (Tex. 2016). If cases like *Lain* were an easy fit for condemnation of public land, it seems the supreme court would have said so by now.

Also, condemnation of public land never involves improvident governmental actions, which are immunity's chief concern. By contrast, trespass to try title and tax foreclosure cases invariably involve improvident actions of governmental officials. Foreclosure suits, for instance, arise out of the failure to pay taxes, typically an improvident action. Likewise, trespass to try title suits often involve allegations of something akin to an intentional trespass, theft or negligence (*e.g.*, negligent title examination). The distinction is key in determining whether immunity applies. *Lain*, 349 S.W.2d at 552-53 (differentiating between trespass to try title brought against governmental entities directly, in which immunity applies, and trespass to try title brought against governmental officials for their improvident *ultra vires* actions, in which immunity does not apply). As the supreme court explained in *Lain*:

One who takes possession of another's land without legal right is no less a trespasser because he is a state official or employee, and the owner should not be required to obtain legislative consent to institute a suit to oust him simply because he asserts a good faith but overzealous claim that title or right of possession is in the state and that he is acting for and on behalf of the state.

When in this state the sovereign is made a party defendant to a suit for land, without legislative consent, its plea to the jurisdiction of the court based on sovereign immunity should be sustained in limine. But the cited cases clearly recognize that when officials of the state are the only defendants, or the only remaining defendants, and they file a plea to the jurisdiction based on sovereign immunity, it is the duty of the court to hear evidence on the issue of title and right of possession and to delay action on the plea until the evidence is in. If the plaintiff fails to establish his title and right of possession, a take nothing judgment

should be entered against him as in other trespass to try title cases. If the evidence establishes superior title and right of possession in the sovereign, the officials are rightfully in possession of the sovereign's land as agents of the sovereign and their plea to the jurisdiction based on sovereign immunity should be sustained. If, on the other hand, the evidence establishes superior title and right of possession in the plaintiff, possession by officials of the sovereign is wrongful and the plaintiff is entitled to relief. In that event the plea to the jurisdiction based on sovereign immunity should be overruled and appropriate relief should be awarded against those in possession.

349 S.W.2d at 552-53. In cases like trespass to try title, therefore, the *ultra vires* doctrine gives the party seeking rightful title to the land an adequate remedy, while the State itself is protected by immunity.

Condemnation of public land, however, is fundamentally different. The *ultra vires* doctrine does not apply to condemnation of public land, where improvident actions by individual public officials exposing the State to liability are never an issue. Moreover, the Property Code *requires* the joinder of the State in a condemnation where the State is the property owner. TEX. PROP. CODE § 21.012(b)(3). Hence, the so-called “suit for land” cases relied upon by District 1 are readily distinguishable.

E. The vacated opinion of the court of appeals in *Oncor* lends no authority to District 1’s position

The only appellate court decision that ever specifically recognized immunity in a condemnation case – and upon which District 1 is relying - was a 2010 split decision of the Dallas Court of Appeals in which the majority felt constrained, by a lack of “guidance from the legislature or supreme court,” from rejecting immunity. *Dallas*

Area Rapid Transit v. Oncor Elec. Delivery Co., 331 S.W.3d 91, 99 (Tex. App.—Dallas 2010) (“[W]e cannot conclude, without guidance from the legislature or supreme court, that condemnation actions such as the one at issue do not implicate governmental immunity.”), *rev’d on other grounds*, 369 S.W.3d 845, 849 (Tex. 2012). Not only was the court of appeals reversed on other grounds in this case, the opinion itself was *vacated* in its entirety. *See Oncor*, 369 S.W.3d at 851 (vacating the opinion and judgment of the court of appeals and remanding the case to the trial court for further proceedings.”). While the majority opinion in *Oncor* might still be found on Westlaw or Lexis, it is nothing more than a digital ghost. Even if it carried any weight, its reasoning is fundamentally flawed. 331 S.W.3d at 107-08 (Murphy, J., dissenting). Most notably, its reliance on trespass to try title cases was faulty for the same reasons such cases are inapposite here.

The *Oncor* dissent would have correctly (in hindsight) held that immunity does not apply to condemnation of public land because condemnation is an *in rem* proceeding. 331 S.W.3d at 108. We know the dissent was correct because ten years later, the supreme court finally provided the “guidance” longed for by the *Oncor* majority. Specifically, *City of Conroe* adopted the same *in rem* analysis relied upon by the *Oncor* dissent: immunity does not apply to an *in rem* proceeding that does not implicate the nature and purpose of immunity. *City of Conroe*, 602 S.W.3d at 458. Although *City of Conroe* did not involve condemnation of public land, the case at bar

is governed by *City of Conroe* because condemnation is an *in rem* proceeding that does not threaten the nature and purpose of immunity. Immunity is simply not required to protect any valid interest of the State. Those interests are already protected by the constitutional requirement of just compensation and the common law doctrine of paramount purpose. The dissent in *Oncor* got it right after all.⁵

F. Conclusion

The Court should grant issue 1 and reverse and remand for trial. Exempting condemnation of public land from immunity is good law and good policy. *City of Conroe* rejects immunity's application to *in rem* proceedings that do not threaten the nature and purpose of immunity. Condemnation of public land is just such a proceeding. Condemnation of public land also offers the State valuable protections like just compensation and the paramount purpose doctrine. Rejecting immunity and relying instead on just compensation and the paramount purpose test balances the

⁵ District 1 cites two other condemnation cases that have addressed immunity, but District 1 unfairly characterizes their holdings. Appellee's Brief at 37 (citing *Burlington N. & Santa Fe Ry. Co. v. City of Houston*, 171 S.W.3d 240, 245–46 (Tex. App.—Houston [14th Dist.] 2005, no pet.) and *State v. Montgomery Cnty.*, 262 S.W.3d 439, 442–43 (Tex. App.—Beaumont 2008, no pet.)). Both cases held that immunity had been waived. District 1 then seeks to expand the holdings, however, saying the two courts “[never] even questioned whether immunity would apply if not waived by the Legislature.” In neither case, however, did the condemnor even make the argument that condemnation proceedings are categorically excluded from the immunity defense. Therefore, the courts had no reason to consider the issue because it was not raised. These cases were also decided before *City of Conroe* adopted its “nature and purpose” test for determining whether immunity applies in an *in rem* proceeding. Under *City of Conroe*, the results in *Burlington* and *Montgomery Cnty.* were correct, but for the wrong reasons.

financial interests of the State and the public's interest in cost-effective and orderly development and improvement of infrastructure and other public uses.

II. In any Event, the Water Code waives Immunity

In the unlikely event the Court determines that immunity applies to condemnation of public land under the common law, the Water Code clearly and unambiguously waives that immunity.

A. Rules of Construction

The purpose of the “clear and unambiguous” rule in determining whether the legislature has waived immunity is to “guarantee that courts adhere to legislative intent.” *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 3 (Tex. 2000). The doctrine is therefore not applied mechanically to defeat the true purpose of the law. *Id.*

Thus, the “strict construction” sometimes required in construing statutes granting the power of eminent domain

is not, however, the exact converse of liberal construction, for it does not require that the words of a statute be given the narrowest meaning of which they are susceptible. The language used by the Legislature may be accorded a full meaning that will carry out its manifest purpose and intention in enacting the statute, but the operation of the law will then be confined to cases which plainly fall within its terms as well as its spirit and purpose.

Coastal States Gas Prod. Co. v. Pate, 309 S.W.2d 828, 831 (Tex. 1958). Additionally, an express grant of the power to condemn has been held to imply “every other power necessary and proper to the execution of the power expressly granted.” *Humble Pipe*

Line Co. v. State, 2 S.W.2d 1018, 1019 (Tex. Civ. App.—Austin 1928, writ ref’d). *See City of Galveston v. Mann*, 143 S.W.2d 1028, 1034 (Tex. 1940) (stating that the rule applies “where a right not expressly granted ... is so patently implied as to leave no room for reasonable doubt”⁶

B. The Water Code waives Immunity

Chapter 49 of the Water Code clearly and unambiguously expresses legislative intent to waive immunity in condemnations of public land brought by water districts.

In relevant part, section 49.222(a) provides:

A district or water supply corporation may acquire by condemnation ***any land***, easements, or other property inside or outside the district boundaries, or the boundaries of the certificated service area for a water supply corporation, necessary for water, sanitary sewer, storm drainage, or flood drainage or control purposes or for any other of its projects or purposes

Id. (emphasis added). Immediately following 49.222(a), section 49.223(a) then provides that in condemning land, a water district is responsible for costs necessitated by “relocat[ing], raising, lowering, rerouting, or chang[ing] in grade or alteration of construction” any “road, bridge, [or] highway” TEX. WATER CODE § 49.223(a).

Section 49.222’s unambiguous language clearly evidences legislative intent to waive immunity, while section 49.223(a)’s language clearly and unambiguously backs

⁶ This rule was rejected by the Dallas Court in its short-lived *Oncor* decision, which was reversed on other grounds, and the supreme court did not discuss the rule in its own opinion. *Oncor*, 331 S.W.3d at 100-01.

it up. The language is neither ambiguous nor “cursory;”⁷ it does not fall under the supreme court’s “may plead or be impleaded” jurisprudence;⁸ it does not require the Court to make any “across the board rulings;”⁹ and it does not require magic words identifying specific “public land.”

To begin, there is nothing “cursory” about the language in the statutes. The language that was held to be too “cursory” to survive the clear and unambiguous test in *Herrera* was the following statement contained in a university’s personnel handbook: “[a]n eligible employee may also bring a civil action against an employer for violations [of the FMLA].” *Herrera*, 322 S.W.3d at 201. As the supreme court read the language, the handbook “actually reveal[ed] nothing about an intent to waive immunity.” *Id.* (citing *Tooke*, 197 S.W.3d at 342). The court went on to observe that

The handbook states that employees may sue for violations of the FMLA but makes no attempt to expand the universe of actionable violations by explicitly waiving immunity that UTEP otherwise enjoys. Indeed, it is impossible to grasp how **fleeting** language in a policy manual can “clearly and unambiguously” waive immunity when far more overt declarations in statutes enacted by the Legislature fall short.

⁷See *Univ. of Tex. at El Paso v. Herrera*, 322 S.W.3d 192, 201 (Tex. 2010) (holding that employees “may also bring a civil action” language in a university’s personnel handbook was too “cursory” to waive immunity).

⁸See *Tooke v. City of Mexia*, 197 S.W.3d 325, 328-29 (Tex. 2006) (holding that, without more, language that the government may “plead and be impleaded,” or “sue and be sued” (or similar type language), is not, in and of itself, sufficient to waive immunity).

⁹See *City of Galveston v. State*, 217 S.W.3d 466, 470 (Tex. 2007) (endeavoring to avoid across-the-board rulings abrogating immunity).

Id. (emphasis added and citing *Tooke* again for its ruling that, without more, allowing the government to “sue or be sued” is insufficient, in and of itself, to evidence waiver).

A legislative enactment declaring that water districts have the power of condemnation over “any land” is a far cry from “fleeting” language in a university handbook describing employees’ rights under part of a federal statute that does not, itself, waive immunity.¹⁰ Chapter 49’s statutory language, unlike a “fleeting” part of a sentence in a university’s personnel handbook, is direct and specific language used by the legislature to describe the scope of condemnation belonging to certain governmental entities. District 1’s reliance on *Herrera* is misplaced.

Similarly, *Tooke*’s holding limiting the effect of language like “may plead and be impleaded” or “sue and be sued” is not even close to the case at bar. *Tooke* is based on a long history in which phrases like “may plead or be impleaded” or “sue or be sued” have been used to describe the *capacity* of a governmental unit to be sued, not its immunity. *Tooke*, 197 S.W.3d at 333. The court’s holding was merely that such language,” *in and of itself, and without more*, is ambiguous with respect to whether a legislative body intended to waive immunity.

¹⁰ Earlier in its opinion, the *Herrera* court had held that the part of the FMLA in dispute (the FMLA’s “self-care” provision) does not abrogate state immunity. 322 S.W.3d at 194-201.

The Water Code's language, on the other hand, can reasonably be read only one way: water districts clearly have the authority to condemn "any land," which includes "roads, bridges, and highways," which are typical examples of public infrastructure.

District 3's issue 2 does not require an "across the board ruling[] abrogating immunity." Compare *City of Galveston*, 217 S.W.3d at 470. In its "endeavor to avoid" such rulings, the supreme court in *City of Galveston* was addressing tort liability and honoring what the court characterized as "the Legislature's recent efforts to channel governmental claims away from litigation." *Id.* To District 3's knowledge, there is no similar legislative effort to "channel" condemnation of public land "away from litigation." In the absence of the landowner's consent, a statutory condemnation proceeding is the exclusive way land, whether public or private, can be acquired for public purposes. Chapter 49 says water districts have the power to condemn "any land," but in exercising that power, they are responsible for damage to "roads, bridges, and highways." Instead of asking for an "across the board ruling[] abrogating immunity," all issue 2 seeks is a ruling that IF immunity exists in the first place, the Water Code has waived it.

Finally, there is the issue, raised by District 1, whether 49.222(a) is insufficient to waive immunity absent language much more specific than "any land," or even "public land," waiving immunity as to specific public property. Appellee's Brief at 47 (citing *Oncor*). The language in *Oncor* upon which District 1 relies is the following:

A general provision that electric utilities can condemn public land *might* be construed merely to recognize a power that cannot be exercised without a specific waiver of immunity, just as a statute authorizing a governmental entity to “be sued” does not waive immunity for all suits. *But* Section 37.053(d) is very specific: only electric corporations, only some land, and only with PUC approval.

Oncor, 369 S.W.3d at 850 (emphasis added). But the emphasized parts of this quote show that *Oncor* was merely observing an issue it was not required to decide. There was no holding in *Oncor* to support District 1’s view of the type of language required to waive immunity.

Even the absence from section 49.222(a) of the words “public land” does not undermine District’s 3’s reading of the statute. Two sections of the Utilities Code were discussed in *Oncor*: TEX. UTIL. CODE § 181.004 (providing that “[a] gas or electric corporation has the right and power to enter on, condemn, and appropriate the land, right-of-way, easement, or other property *of any person or corporation*”) (emphasis added); and TEX. UTIL. CODE § 37.053(d) (“the rights extended to an electric corporation under Section 181.004 include *all public land, except land owned by the state*, on which the commission has approved the construction of the line.”) (emphasis added). The court of appeals had held that section 181.004 did not waive immunity. 331 S.W.3d at 100-106. While the case was pending in the supreme court, the legislature enacted section 37.053(d). As a result, the supreme court disposed of the case upon the new section 37.053(d), holding that its language extending 181.004 to include “all public land, except land owned by the state” clearly and unambiguously

waived immunity except as to the State itself. 369 S.W.3d at 850-51. In passing on whether 181.004 waived immunity even without 37.053(d), the supreme court observed that the issue would have presented “a difficult question,” *id.* at 849-50, strongly suggesting that the Dallas court’s reading of 181.004 was not necessarily the correct one.

181.004’s operative term under the microscope in *Oncor* was “person,” not “land.” The issue under 181.004 was whether the land of “any person” included government land. Despite *Oncor*’s claim to the contrary, *Oncor* essentially was arguing that “any person” included the government because the Code Construction Act says so. *See* TEX. GOV’T CODE § 311.005(2) (“‘Person’ includes ... government or governmental subdivision or agency...”). *Oncor*’s problem in the court of appeals was that under another section of the Code Construction Act, the definition of “person” in 311.005 “does not indicate legislative intent to waive sovereign immunity unless the context of the statute indicates no other reasonable construction.” *Id.* at § 311.034. The question the supreme court considered “difficult” in *Oncor* was whether section 181.004 of the Utilities Code satisfied 311.034’s admonition. There is no such issue here because “person” is not an operative term.

Likewise, the issue in *Tooke*, which was a contract-claims case, was whether words simply providing that a home-rule municipality “may plead or be impleaded in any court” were intended to waive immunity or merely describe the municipality’s

capacity to plead or be impleaded. *See* TEX. LOC. GOV'T CODE § 51.075. Again, the analysis adopted by the supreme court is of no help in determining whether, in the condemnation context, “any land” includes public land.

The legislature could have chosen to include the word “public” in section 49.222(a)’s reference to “any land,” like it did in section 49.218(c)’s reference to “all land,” but the absence of “public” from 49.222(a) is not dispositive. As the supreme court has held, there are no “magic” words required to express the legislative intent to waive immunity – a statutory waiver is not required to be a “model of clarity,” and therefore legislative consent need not be as “explicit” as it could be. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). If anything, the legislature could have also chosen to include the word “private” in 49.222(a)’s reference to “any land,” but it didn’t. The absence of both “public” and “private” from 49.222(a), contrasted with the use of both “public” and “private” in 49.218(c), doesn’t show anything other than “any land” and “all land” mean both public and private. Section 49.222(a) is as explicit as it needs to be in order to waive immunity.¹¹

¹¹ Examination of the grammatical structure of the two sections, in context, shows that “any,” as used in 49.222(a), and “all,” as used in 49.218(c), are also intended to have the same meaning. *See Kirby Lake Dev’p, Ltd. v. Clear Lake City Water Authority*, 320 S.W.3d 829, 840-41 (Tex. 2010) (observing that “[t]he word ‘any’ is a flexible word that may have any one of several meanings according to its use,” therefore in determining its meaning for purposes of construing contracts, the court examines the use of the term in context and with respect for the grammatical structure of the contract).

CONCLUSION

Condemnation is an *in rem* proceeding. Immunity does not apply to *in rem* proceedings that do not threaten the nature and purpose of immunity, which is to protect the State from personal liability. Condemnation of public land does not threaten personal liability. Moreover, the State has plenty of protection in condemnation suits, beginning with the constitutional right of just compensation, and including the doctrine of paramount purpose. To cloak condemnation with blanket immunity instead would disrupt public projects and create needless exposure on the part of neighboring private landowners. Applying immunity would either prevent District 3's public project entirely or require District 3 to re-route its pipeline to cross the property of private landowners, resulting in the condemnation of land not otherwise "necessary for water, sanitary sewer, storm drainage, or flood drainage or control purposes or for any other of its projects or purposes." As a matter of law, therefore, immunity does not apply to condemnation under the Water Code.

Strictly in the alternative, the Water Code waives immunity. Chapter 49 leaves no doubt that the legislature intended to give water districts the right to condemn public land. Regardless of whether there is no immunity to begin with, or it has been waived, this Court should therefore reverse the Order of Dismissal and remand this cause for a trial on the merits.

RELIEF REQUESTED

District 3 prays for a reversal of the trial court's Order of Dismissal and a remand of this cause for a trial on the merits. District 3 prays for all other relief to which it may be entitled.

Respectfully submitted,

Frank Weathered P.C.

P.O. Box 6935

Corpus Christi, TX 78466

Phone: (361) 904-3157

By: /s/ Frank Weathered

Frank Weathered

State Bar No. 20998600

Email: frank@weatheredlaw.com

W. Brad Anderson

State Bar No. 24055106

Jackson Walker L.L.P.

100 Congress Avenue, Suite 1100

Austin, TX 78701

Phone: (512) 236-2000

Fax: (512) 236-2002

Email: banderson@jw.com

Randolph K. Whittington

State Bar No. 21404500

**Law Office of Randolph Kimble
Whittington**

2014 East Harrison Avenue

Harlingen, Texas 78550

Phone: (956) 423-7200

Fax: (956) 423-7999

Email: chagofuentes@rkwlaw.com

ATTORNEYS FOR APPELLANT/CONDEMNOR

CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with the type-face and length requirements of TEX. R. APP. P. 9.4(i). Exclusive of the exempted portions stated in rule 9.4(i)(1), the brief contains 7,430 words, as calculated by Microsoft Office 2019, the program used to prepare this document.

/s/ Frank Weathered
Frank Weathered

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this filing was served on the following counsel of record via the Court's electronic filing system on December 7, 2020:

J. Joseph Vale, Jr.
Atlas Hall & Rodriguez, L.L.P.
818 Pecan
McAllen, TX 78501
jvale@atlashall.com

Daniel G. Gurwitz
Atlas Hall & Rodriguez, L.L.P.
818 Pecan
McAllen, TX 78501
dgurwitz@atlashall.com

Meredith D. Helle
Atlas Hall & Rodriguez, L.L.P.
818 Pecan
McAllen, TX 78501
mhelle@atlashall.com

/s/ Frank Weathered
Frank Weathered

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Mel Galvan on behalf of Frank Weathered
Bar No. 20998600
mel@dcklawyers.com
Envelope ID: 48702953
Status as of 12/7/2020 3:10 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Frank Edward Weathered	20998600	frank@weatheredlaw.com	12/7/2020 3:03:17 PM	SENT
Randolph K. Whittington	21404500	chagofuentes@rkwlaw.com	12/7/2020 3:03:17 PM	SENT
Warren Anderson	24055106	banderson@jw.com	12/7/2020 3:03:17 PM	SENT
Daniel G. Gurwitz	787608	dgurwitz@atlashall.com	12/7/2020 3:03:17 PM	SENT
Mel Galvan		Mel@dcklawyers.com	12/7/2020 3:03:17 PM	SENT

Associated Case Party: Hidalgo County Irrigation District No. 1

Name	BarNumber	Email	TimestampSubmitted	Status
Allison Boyle	24087197	aboyle@atlashall.com	12/7/2020 3:03:17 PM	SENT
Joel Vale	24084003	jvale@atlashall.com	12/7/2020 3:03:17 PM	SENT
Meredith D.Helle		mhelle@atlashall.com	12/7/2020 3:03:17 PM	SENT
Tammie Rodriguez		tjr@atlashall.com	12/7/2020 3:03:17 PM	SENT
Nikki Pugmire		nmowbray@atlashall.com	12/7/2020 3:03:17 PM	SENT
Meredith Helle	24106188	mlarson@atlashall.com	12/7/2020 3:03:17 PM	SENT